Supreme Court, U.S.
FILED

08-641 NOV 12 2008

No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

MICHAEL FRANKLIN,
Petitioner,

v.

GREGORY SIMS, WARDEN
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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November 12, 2008

QUESTION PRESENTED

Does the Seventh Circuit's decision conflict with *Batson v. Kentucky*, 476 U.S. 79 (1986), by affirming the summary denial of a defendant's *Batson* objection on the grounds that it was not unreasonable for state courts to rely primarily upon the presence of minority venirepersons on the jury as the basis for negating a *prima facie* inference of discrimination from the prosecution's unexplained exclusion of other minority venirepersons?

PARTIES TO THE PROCEEDING

The parties below were (1) Michael Franklin and (2) Gregory Sims, Warden, Taylorville Correctional Center, Taylorville, Illinois. The real party in interest is the State of Illinois.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Franklin asks this Court to issue a writ of certiorari to review and reverse the decision of the United States Court of Appeals for the Seventh Circuit rejecting his claim that the jury that convicted him was selected in a manner violating the requirements of *Batson v. Kentucky*, 476 U.S. 89 (1986).

OPINIONS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit is published at 538 F.3d 661 (7th Cir. Aug. 14, 2008), and is reprinted at App. A, 1a - 13a. The Court of Appeals affirmed a denial of Franklin's petition for habeas corpus by the United States District Court for the Northern District of Illinois. The District Court opinion is reprinted at App. B, 14a - 17a. The Illinois Appellate Court opinion is unpublished; relevant excerpts of the opinion and dissent discussing Franklin's *Batson* objection are reprinted at App. C, 18a - 43a.

JURISDICTION

On August 14, 2008, the Court of Appeals announced its decision affirming the District Court's denial of Petitioner's petition for a writ of habeas corpus. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Title 28, Section 2254 of the United States Code provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF FACTS

Petitioner Michael Franklin was convicted of armed robbery after a jury trial in Illinois Circuit

Court and sentenced to 23 years in prison. During voir dire conducted on February 4, 2003, the trial court questioned dozens of prospective jurors individually. (App. D at 44a - 46a). Four African American venire persons were questioned: Margaret Cooley, Alma Minefe, Lance Tyson, and Dorothy Gandy. Each one stated that they could be fair and impartial and apply the law. (App. D at 50a - 51a, 53a - 54a, 55a, 57a - 59a, 63a, 65a).

The trial court called a panel of four prospective jurors into the jury box for peremptory strikes. (App. D at 66a). Ms. Cooley and Ms. Minefe were on the first panel. (*Id.*) The State's Attorney used his first peremptory strike against Ms. Cooley. (*Id.*) Mr. Tyson was then called to take Ms. Cooley's place as a prospective juror. (*Id.*) The State's Attorney used his next peremptory strike against Mr. Tyson. (*Id.*)

Franklin's counsel immediately objected on *Batson* grounds. (App. D at 67a) The trial court summarily denied this objection stating that Franklin had failed to demonstrate a "*prima facie* case of systematic exclusion." (App. D at 67a - 69a). The trial court observed that the panel tendered "contains one African American." (App. D at 68a.) This was the sole factual finding made by the trial judge, and the prosecution did not provide race-neutral reasons for its strikes. (*Id.*)

After two more peremptory strikes, the final African American venireperson, Dorothy Gandy, was selected. (App. D at 69a - 70a.) The trial judge stated: "[T]he record should reflect that the first panel is Minefe, Freels, Gandy and McVicker. I

believe there's four jurors, two are African American. Okay. That's your first panel." (App. D at 70a.).

The final selected jury consisted of twelve members, two of whom (Minefe and Gandy) were African American. (App. C at 27a). After his conviction, Franklin appealed to the Illinois Appellate Court, arguing that the State unconstitutionally exercised its peremptory strikes against two other African American venire persons in violation of the principles set forth in *Batson v. Kentucky*, 476 U.S. 79 (1986). On September 9, 2005, the Illinois Appellate Court affirmed.

The Illinois Appellate Court reviewed Franklin's *prima facie* claim by applying seven "relevant circumstances" identified by the Illinois Supreme Court. (App. C, at 25a - 29a, *citing People v. Williams*, 670 N.E.2d 638, 650 (Ill. 1996)). These seven "relevant circumstances" were: (1) the racial identity between the defendant and the excluded venire persons; (2) a pattern of strikes against African American venire persons; (3) a disproportionate use of peremptory strikes against African-American venire persons; (4) the level of African-American representation in the venire as compared to the jury; (5) the prosecutor's questions and statements during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African-American venire persons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the defendant, victim, and witness. (*Id.*)

Construing the record against Franklin, the Illinois Appellate Court found that there were four African Americans in the 36-person venire. (App. C at 26a.) The Illinois Appellate Court concluded that most of the *Williams* factors were neutral, in the sense that they did not affirmatively support or negate the Franklin's *prima facie* case. (App. C at 25a - 29a.) However, the court found the fourth *Williams* factor, the level of African-American representation in the venire as compared to the jury, weighed against Franklin's *Batson* claim. (App. C at 27a.) The court noted, "African-Americans constituted 16.7% of the jury, but only 11.2% of the entire venire." (*Id.*) The court held that "[t]hese numbers *belie* any claim of purposeful discrimination against African-Americans." (*Id.*) (emphasis added).

The District Court denied Franklin's petition for a writ of habeas corpus. (App. B at 14a - 17a.) The Seventh Circuit affirmed, observing that its decision "turn[ed] largely on the highly deferential standard prescribed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d)(1)." (App. A at 7a.)

The Seventh Circuit held that "the Illinois Appellate Court primarily relied on the fact that the State struck only two out of four African-American jurors of the thirty-six-person venire; that it used only two of its seven peremptory strikes against African-Americans; that at 16%, African-Americans were over-represented on the jury given that they comprised 11% of the venire; and that the victim and two of the witnesses were also African-American."

(App. A at 12a). The Seventh Circuit concluded that "the court's reference to these factors cannot be deemed *unreasonable*—as required by AEDPA." (*Id.*)

REASONS FOR GRANTING THE WRIT

This petition should be granted to settle a broad and fundamental Circuit split concerning *Batson v. Kentucky*, 476 U.S. 79 (1986). The Seventh Circuit held that it was not unreasonable under *Batson* for a state court to consider statistics based on the numbers and percentages of African American venirepersons included on the jury as factors weighing against an inference of discrimination. This Court has held, however, that decisions to include minority members on the jury do not excuse or explain decisions to exclude other minority members, at least at *Batson*'s *prima facie* stage.

Seven Circuits consider statistics concerning the racial composition of the jury as a legitimate basis to negate a *Batson* inference at the *prima facie* stage. Three Circuits have rejected that approach, and three of the seven Circuits that allow such consideration have conflicting authority on both sides of the issue.

Further, several state courts of last resort are in sharp conflict as to whether consideration of inclusion-based statistics is proper at the *prima facie* stage of a *Batson* inquiry. Given the depth and breadth of the divisions between the positions and the state of confusion within certain jurisdictions,

there is nothing to be gained by allowing this issue to percolate further.

I. This Petition Should Be Granted To Resolve A Circuit Split On Whether Courts May Consider Statistics Based On The Race of Included Jurors As A Basis To Negate A *Prima Facie* Inference Of Discrimination At *Batson*'s First Stage.

Statistics that focus on the number or percentage of racial or ethnic minorities that are allowed to participate on a jury should not be considered at the *prima facie* stage of a *Batson* inquiry because such statistics are irrelevant.

A. Consideration Of Inclusion-Based Measures Is Directly Contrary To And An Unreasonable Application Of This Court's Clearly Established *Batson* Jurisprudence.

This Court stated that inclusion of some African-Americans on a jury cannot insulate the exclusion of other African Americans from *Batson's* individualized scrutiny. In *Batson*, this Court noted that "[a] single invidiously discriminatory act is not immunized by the absence of such discrimination in the making of other comparable decisions." 476 U.S. at 95.

Statistics based on the numbers or percentages of minority members included on a trial jury do not in themselves demonstrate the absence of racial discrimination in the selection of the jury. Some courts have held that such statistics can indicate the

prosecution's "good faith" in exercising its peremptory strikes. However, this Court has long held, even prior to *Batson*, that "affirmations of good faith . . . are insufficient to dispel a prima facie case" of discrimination because "[t]he result bespeaks discrimination, whether or not it was a conscious decision." *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972). This Court has stated more recently that courts should not speculate as to the prosecutor's motives when "asking a simple question" at stage two of the *Batson* process would "produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process." *Johnson v. California*, 545 U.S. 162, 172 (2005). Focusing on the inclusion of minority jurors as a sign of prosecutorial "good faith" could also provide prosecutors with an "easy means of justifying a pattern of unlawful discrimination which stops only slightly short of total exclusion." *People v. Snow*, 44 Cal.3d 216, 225, 242 Cal. Rptr. 477, 482 (Cal. 1987). As here, a prosecutor might switch gears after his discriminatory use of peremptory strikes elicits a *Batson* objection.

Inclusion-based statistics are also not relevant to the extent that they are used to show the lack of prejudice suffered by the defendant. This Court emphasized in *Powers v. Ohio*, 499 U.S. 400 (1991), that a *Batson* inquiry is designed to protect not only defendants but also individual jurors and the community from racially-motivated peremptory challenges. *Id.* at 411. Thus, "[b]ecause the right to nondiscriminatory jury selection procedures belongs

to the potential jurors . . . , the possibility that members [of a cognizable group] will get on the jury despite the intentional discrimination is *beside the point.*" *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 n. 13 (1994) (emphasis added).

Further, such statistics are not relevant as mere counterweights to an inference of discrimination, at least at the *prima facie* stage. This Court has held that evidence relating to the *strength* of an inference of purposeful discrimination is not relevant until the third stage of a *Batson* inquiry. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (*per curiam*) ("It is not until the *third* step that the persuasiveness of the justification becomes relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination.") More recently, this Court described the "burden-shifting framework" of *Batson* as "just a means of arranging the presentation of evidence" and involving "no credibility assessment" at steps one or two. *Johnson*, 545 U.S. at 171 n. 6. Thus, if the only relevance of the inclusion of minority members on the jury pertains to the weight or persuasiveness of an inference of discrimination, consideration of such evidence at the *prima facie* stage of a *Batson* inquiry is no longer appropriate after *Purkett* and *Johnson.*

This Petition should be granted because inclusion-based statistics are irrelevant at the *prima facie* stage of a *Batson* inquiry, and therefore, consideration of such statistics is an objectively unreasonable application of *Batson.*

B. There Is A Broad Circuit Conflict Concerning The Relevance Under *Batson* Of The Inclusion Of Minority Members On The Trial Jury.

Recent decisions on both sides of the issue show that *Batson* is being applied unevenly nationwide and that the divisions are not resolving themselves.

1. Seven Federal Courts of Appeals Allow Courts To Consider The Inclusion Of Minority Members As A Relevant Basis To Defeat An Inference Of Discrimination.

Seven federal Courts of Appeal have, at one time or another, held that courts can consider the number or percentage of minority members on the trial jury as significant relevant circumstances that can negate a *prima facie* inference of discrimination. Many of these courts follow the leading decisions of *United States v. Dennis*, 804 F.2d 1208 (11th Cir. 1986) and *United States v. Sangineto-Miranda*, 859 F.2d 1501 (6th Cir. 1988). As this Petition discusses below, however, there is conflicting authority within three of these seven jurisdictions. *See infra* Sec. I.B.3.

The prosecution in *Dennis* used three out of its four peremptory strikes against African-American venirepersons. 804 F.2d at 1211. The Eleventh Circuit concluded that there was no viable *Batson* claim, however, because it was "obvious that the government did not attempt to exclude all blacks, or as many blacks as it could from the jury." *Id.* The court stated that "the unchallenged presence of two

blacks on the jury undercuts any inference of impermissible discrimination." *Id.*

A few months after the Eleventh Circuit decided *Dennis*, the Sixth Circuit decided *Sangineto-Miranda*. The Sixth Circuit stated that if "the percentage of minority members in the ultimate jury is the same or greater" than was present in the venire, "that would be a factor tending to negate the inference of discrimination." 859 F.2d at 1521-22. Similarly, the Sixth Circuit held that "[i]f there are minority members on the jury but the prosecutor did not use all its peremptory challenges, that would be a factor tending to refute discrimination." *Id.* at 1522.

Several courts have since cited to these leading cases as support for the consideration of inclusion-based statistics. In *United States v. Montgomery*, 819 F.2d 847 (8th Cir. 1987), the Eighth Circuit relied upon *Dennis* and "[t]he fact that the government accepted a jury which included two blacks, when it could have used its remaining peremptory challenges to strike these potential jurors" as the basis to reject a *Batson* claim. *Id.* at 851. The Ninth Circuit would later cite to *Montgomery* as support for the claim that "the willingness of a prosecutor to accept minority jurors weighs against the findings of a prima facie [*Batson*] case." *United States v. Chinchilla*, 874 F.2d 695, 698 n. 4 (9th Cir. 1989).

Citing to both *Dennis* and *Montgomery*, the Fourth Circuit affirmed a conviction over an African American defendant's *Batson* claim which was based on the prosecution's peremptory strikes against two African American venirepersons. *United States v. Lane*, 866 F.2d 103, 104 (4th Cir. 1989). The Fourth Circuit concluded that the prosecutor's conduct in allowing two African American venirepersons to be seated on the jury "weighs heavily in support of the district court finding of no discrimination." *Id.* at 106-07. The Fourth Circuit reached the same conclusion in *United States v. Grandison*, 885 F. 2d 143 (4th Cir. 1989), and relied upon *Dennis, Montgomery, Sangineto-Miranda*, and *Lane* to support its conclusion that "the fact the jury included two black jurors is significant." *Id.* at 147. The Tenth Circuit followed *Grandison* in holding that the final composition of the jury is a relevant circumstance that can negate a *Batson* inference. *United States v. Esparsen*, 930 F.2d 1461, 1468 (10th Cir. 1991).

The First Circuit relied upon *Sangineto-Miranda* in holding that a defendant failed to demonstrate a "pattern" of strikes because the ultimate jury included several African-Americans. *United States v. Escobar-de Jesus*, 187 F.3d 148, 165 (1st Cir. 1999). The First Circuit recently stated that the possibility of seating minority members "might be critical to an assessment of whether a prima facie case was made." *United States v. Girouard*, 521 F.3d 110, 116-17 (1st Cir. 2008) (citing *Escobar-de Jesus*).

2. *Three Federal Courts Of Appeals Clearly Reject Reliance On The Inclusion Of Minority Members On The Trial Jury As A Basis For Defeating A* Prima Facie *Inference Of Discrimination.*

The leading cases that rejected the consideration of inclusion-based statistics as a basis to negate a *Batson* inference are *United States v. Clemons*, 843 F.2d 741 (3d Cir. 1988) and *United States v. Battle*, 836 F.2d 1084 (8th Cir. 1987).

In *Clemons*, the Third Circuit rejected the government's position that "there could be no prima facie case of discrimination under *Batson* because only two blacks were struck." *Id.* at 748. Similarly, in *Holloway v. Horn*, 355 F.3d 707 (3d Cir. 2004), the Third Circuit concluded that "the final composition of the jury . . . offers no reliable indication of whether the prosecutor intentionally discriminated in excluding a member of the defendant's race." *Id.* at 728. Even more recently, the Third Circuit rejected using the inclusion of minority members to defeat a *prima facie* showing of racial discrimination as "directly contrary" to *Batson*'s goal "to ensure that a State does not use peremptory challenges to remove *any* black juror because of his race." *Brinson v. Vaughn*, 398 F.3d 225, 233 (3d Cir. 2005).

In *Battle*, the Eight Circuit emphasized that "the striking of a single black juror for racial reasons violates the equal protection clause, even though other black jurors are seated, and even when there are valid reasons for the striking of some black

jurors." *Id.* at 1086. In *United States v. Johnson,* 873 F.2d 1137 (8th Cir. 1989), the court rejected the argument that there was no *Batson* claim where the prosecutor had already seated two African American venirepersons, stating that this view constituted a "misreading of *Batson,*" and cited to *Battle* and *Clemons* for the proposition that "a *Batson* inquiry focuses on whether or not racial discrimination exists in the striking of a black person from the jury, not on the fact that other blacks may remain on the panel." *Id.* at 1139 - 40; *see also United States v. Moore,* 895 F.2d 484, 487 n. 5 (8th Cir. 1990) (recognizing that "it is the exclusion of blacks and not their inclusion (*i.e.* the final number) that is vital to a prima facie case of discrimination [under *Batson*].")

The Second Circuit has reversed a previously held position that allowed consideration of statistics based on the inclusion of minority members on a jury as a relevant factor negating a *prima facie* inference of discrimination. In *United States v. Alvarado,* 923 F.2d 253 (2d Cir. 1991) ("*Alvarado III*"), the Second Circuit rejected the argument that the prosecutor's failure to exercise an available challenge against a minority venireperson supported a finding of no *prima facie* case of discrimination, stating that "[t]he discrimination condemned by *Batson* need not be as extensive as numerically possible." *Id.* at 256. The Second Circuit stated further that "[a] prosecutor may not avoid the *Batson* obligation to provide race-neutral explanations for what appears to be a statistically significant pattern of racial peremptory

challenges simply by forgoing the opportunity to use all of his challenges against minorities." *Id.*

Alvarado III was decided on remand from this Court, which had vacated the Second Circuit's previous decision in *United States v. Alvarado*, 891 F.2d 439 (2d Cir. 1989) ("*Alvarado I*"). *See Alvarado v. United States*, 497 U.S. 543, 544 (1990) (*per curiam*) ("*Alvarado II*"). In *Alvarado I*, the Second Circuit held that it did not need to reach the issue of whether the defendant had sufficiently alleged a *prima facie Batson* claim, because on review, it was entitled to take a "bottom line" approach and consider the fact that the racial composition of the jury reflected a fair cross section of the community. *Id.* at 445. Before this Court, however, the Solicitor General of the United States confessed that the Second Circuit's "bottom line" analysis was "contrary to *Batson*" and declined to pursue the argument, which led to this Court's remand and the Second Circuit's reversal. *Alvarado II*, 497 U.S. at 544.

3. Conflicting Lines Of Authority Exist In Three Circuits.

Three Circuits now have conflicting decisions on this issue. The Eleventh Circuit recently contradicted its earlier position in *Dennis* by holding that "[t]he trial court's exclusive reliance on a comparison of the proportion of blacks on the petit jury to the proportion of blacks in the venire to determine the presence of a *Batson* violation was in error." *Eagle v. Linahan*, 279 F.3d 926, 942 (11th Cir. 2001). The court concluded that, "[w]hile it may be

true that the prosecution's use of peremptory strikes did not result in a racially unbalanced petit jury, that is not the test for deciding whether there has been an equal protection violation." *Id.*; *cf. Fleming v. Kemp*, 794 F.2d 1478, 1483 (11th Cir. 1986) (rejecting the argument that *Batson* is inapplicable where the prosecutor did not exclude all black jurors); *but see United States v. Campa*, 529 F.3d 980 (11th Cir. 2008) (stating that the "well-established precedent" of *Dennis* "controls" the issue that defendants did not establish a *prima facie Batson* claim where the seated jury included two black persons).

The Sixth Circuit has also recently decided this issue in a manner that conflicts with its holding in *Sangineto-Miranda*. In *Lancaster v. Adams*, 324 F.3d 423 (6th Cir. 2003), the Sixth Circuit, on habeas review, concluded that a state court's application of *Batson* was unreasonable in finding no violation in the peremptory challenge to an African American venireperson because of the prosecution's failure to strike subsequent African American venirepersons. *Id.* at 433-34. The Sixth Circuit concluded that "the prosecutor's decision to select a subsequent African-American juror from the venire does nothing to cure the wrong committed under *Batson*." *Id.* at 434. A recent Sixth Circuit opinion, however, expressly relied upon *Sangineto-Miranda* in finding no *Batson* violation where there was very little difference in the composition of the jury compared to the composition of the venire. *United States v. Ervin*, 266 Fed. Appx. 428, 432 (6th Cir. 2008).

Similarly, although the Seventh Circuit in this case held that it was not unreasonable under AEDPA for the Illinois Appellate Court to rely upon the inclusion of African Americans on the trial jury, it previously stated that the correctness of such an argument was "dubious, given *Batson*'s emphasis on the impermissible nature of discrimination against individual potential jurors" and given this Court's holding in *Connecticut v. Teal*, 457 U.S. 440, 442 (1982), which "reject[ed] the same kind of 'bottom line' approach for Title VII employment discrimination cases." *Coulter v. McCann*, 484 F.3d 459, 467-68 (7th Cir. 2007).

4. There Is Substantial Conflict Among State Courts Of Last Resort As To The Relevance Of Statistics Based On The Inclusion Of Minority Members On The Jury.

In addition to the broad split among federal courts, there is a substantial conflict among state courts of last resort about the continuing relevance of the statistics based on the inclusion of minority members on a jury as evidence tending to negate an inference of discrimination.

Illinois state courts have long considered the inclusion of minorities on a jury as a relevant circumstance that could negate an inference of discrimination. *See Williams*, 670 N.E.2d at 650; *see also People v. Houston*, 890 N.E.2d 424, 429 (Ill. 2008). North Carolina courts also consider the "acceptance rate" of minority jurors as a factor "tending to refute an allegation of discriminatory use

of [peremptory challenges]." *State v. Smith*, 400 S.E.2d 712, 724 (N.C. 1991). The California Supreme Court has cited to the acceptance of minority jurors approvingly as "an appropriate factor for the trial judge to consider in ruling on a [*Batson*] motion." *People v. Reynoso*, 74 P.3d 852, 867 (Cal. 2003).

However, state courts have also rejected consideration of inclusion-based statistics as irrelevant at the outset of a *Batson* inquiry. The New York Court of Appeals held that a defendant made out a *prima facie Batson* claim, despite the inclusion of African American venirepersons on the jury in a percentage resembling the percentage of African Americans in the community. *People v. Jenkins*, 554 N.E.2d 47, 58-59 (N.Y. 1990). The court stated that "the constitutional violation is the exclusion of *any* blacks solely because of their race. If any blacks are so excluded, it is of no moment that the jury nevertheless contains a token number of blacks." *Id.* at 558-59; *see also People v. Bolling*, 591 N.E.2d 1136, 1139 (N.Y. 1992) ("The wrong may occur after only one strike and the prosecution cannot . . . overcome it with evidence that the jury, as finally selected, contained a proportionate number of African-Americans.")

The D.C. Court of Appeals held that a comparison of the racial compositions of the jury and venire is an irrelevant factor. *Little v. United States*, 613 A.2d 880, 886 (D.C. 1992). The court noted that "the mere presence of blacks on the jury in a ratio similar to that of blacks in the venire or community does not

negate a defendant's prima facie case." *Id.* at 886. The Maryland Court of Appeals was also early to reject the notion that "*Batson* may be rendered a priori inapplicable by a prosecutorial game of numbers." *Stanley v. State*, 542 A.2d 1267, 1279 (Md. 1988).

Further, states that once accepted inclusion-based statistics have since rejected them as irrelevant. In Georgia, courts once openly considered such inclusion-based statistics as a basis to defeat a *Batson* inference. *See Aldridge v. State*, 365 S.E.2d 111, 115 (Ga. 1988).[1] The Georgia Supreme Court has since questioned the reasoning of *Aldridge*, holding that the "mere fact that the trial jury contained a greater percentage of black jurors . . . than were in the qualified venire . . . no longer is sufficient to rebut the inference of intentional discrimination." *Staples v. State*, 434 S.E.2d 757, 759 (Ga. 1993); *see also Weems v. State*, 416 S.E.2d 84, 85 (Ga. 1992) (discussing how this Court's evolving *Batson* jurisprudence cast *Aldridge* into doubt).

The Alabama Supreme Court has also changed its position on the relevance of inclusion-based statistics. In *Harrell v. State*, 571 So.2d 1270 (Ala. 1990), the Alabama Supreme Court observed that an

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[1] The Illinois Supreme Court originally cited to *Aldridge* as the basis for allowing Illinois courts to consider inclusion-based statistics. *People v. Evans*, 530 N.E.2d 1360, 1365 (Ill. 1988).

inference of discrimination could be negated with a showing that "a greater percentage of blacks sat on the jury than sat on the lawfully established venire." *Id.* at 1272. Four years later, however, in *Ex Parte Thomas*, 659 So.2d 3 (Ala. 1994), the Alabama Supreme Court disclaimed this observation, stating that "[a] skilled but racially biased attorney could learn to manipulate the strike process . . . as long as some blacks were left on the jury. Such a result should not be approved." *Id.* at 7.

The State of Missouri also changed its stance on the relevance of inclusion-based measures. In *State v. Parker*, 836 S.W.2d 930 (Mo. 1992), the Missouri Supreme Court described the "former practice of placing decisive reliance upon the presence of African-Americans on the defendant's jury . . . to undercut any inference of discrimination is no longer valid" because of this Court's evolving *Batson* jurisprudence. *Id.* at 940.

Clearly, fundamental divisions exist between state courts of last resort. Although a few courts have, upon close consideration of the issue, reversed their position and rejected inclusion-based statistics as irrelevant, other courts still uncritically accept such statistics as appropriate and even significant. The persistence of these divisions shows that there is no benefit to further percolation. This petition is an ideal vehicle for this Court to address this broad and fundamental dispute and ensure the uniform application of the Equal Protection principles of *Batson* nationwide.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for writ of certiorari.

Respectfully submitted,

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November 12, 2008